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Nos. 98-876, 98-7027 and 98-7069

In the Supreme Court of the United States

OCTOBER TERM, 1998

RICK CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

DARRELL CHIP WADENA, PETITIONER

v.

UNITED STATES OF AMERICA

JERRY JOSEPH RAWLEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal criminal laws of general applicability may apply in Indian country when both the perpetrator and victim are Indians.

2. Whether 18 U.S.C. 241 may apply to conspiracies to commit vote fraud in a tribal election.

3. Whether the district court committed reversible error in informing the jury that the White Earth Band of Chippewa Indians is an "Indian tribal organization," for purposes of 18 U.S.C. 1163, and an "Indian tribal government" for purposes of 18 U.S.C. 666.

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OPINION BELOW

The opinion of the court of appeals (Clark Pet. App. A54-A107) is reported at 152 F.3d 831.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1998 (Clark Pet. App. A53). A petition for rehearing was denied on August 27, 1998 (Clark Pet. App.

A108-A109). The petition for a writ of certiorari in No. 98-7027 was filed on November 24, 1998. The petitions for a writ of certiorari in No. 98-876 and No. 98-7069 were filed on November 25, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioners Darrell Chip Wadena, Rick Clark, and Jerry Joseph Rawley, Jr., were convicted on one count of conspiracy, in violation of 18 U.S.C. 371, and multiple counts of theft or bribery involving programs receiving federal funds, in violation of 18 U.S.C. 666; money laundering, in violation of 18 U.S.C. 1957; and willful misapplication of tribal funds, in violation of 18 U.S.C. 1163 (1994). Clark and Rawley were also convicted on one count of conspiracy to oppress the free exercise of federal rights, in violation of 18 U.S.C. 241 (1994), and multiple counts of mail fraud, in violation of 18 U.S.C. 1341. Clark Pet. App. A43, A55; Wadena Pet. App. A95; Rawley Judgment 1.

Wadena was sentenced to concurrent terms of 51 months' imprisonment on each of the 15 counts on which he was convicted. Clark was sentenced to concurrent terms of 46 months' imprisonment on each of the 22 counts on which he was convicted. Rawley was sentenced to concurrent terms of 37 months' imprisonment on each of the 17 counts on which he was convicted. Each petitioner's sentence was to be followed by three years' supervised release. Each petitioner was ordered to pay restitution, a fine, and a special assessment. Clark Pet. App. A43-A51, A55-A56 n.1; Gov't C.A. Br. 2.

The court of appeals affirmed petitioners' convictions but remanded for resentencing. Clark Pet. App. A102. On remand, the district court sentenced Wadena to concurrent terms of 33 months' imprisonment, Clark to concurrent terms of 21 months' imprisonment, and Rawley to con-

current terms of 30 months' imprisonment. Clark Pet. 2; Wadena Pet. App. A96; Rawley Judgment 3.

1. Petitioners are members of the White Earth Band of the Minnesota Chippewa Tribe. The White Earth Band has an 880,000-acre Reservation in northwest Minnesota. Of the approximately 22,000 members of the White Earth Band, approximately 3,800, including petitioners, live on the Reservation. Clark Pet. App. A56.

During the period 1990 to 1994, petitioners served on the five-member Reservation Tribal Council (RTC), the White Earth Band's elected governing body. Wadena was chairman of the RTC, Rawley was treasurer, and Clark was a councilman. As members of the RTC, petitioners controlled, among other things, the disbursement of tribal funds. Clark Pet. App. A56 & n.2.

The government's prosecution of petitioners involved three distinct, but related, conspiracies carried out in the early 1990s:

The Construction Conspiracy. In 1991, the RTC authorized the use of approximately $5 million from the White Earth Economic Development and Tribal Government Fund for the construction of the Shooting Star Casino on the Reservation.[1] The RTC appointed Clark to oversee the construction of the casino and hired Gordon Construction, Inc., to act as general contractor. Gordon Construction subcontracted for drywall installation with Northern Drywall and Construction, Inc., a company that Clark himself owned and managed, even though the company had not submitted a formal bid and had never undertaken a project of similar scale. Clark Pet. App. A57.

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[1] The Fund was established pursuant to the White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, 100 Stat. 61, "for economic development for the benefit of the White Earth Band of Chippewa Indians." The approximately $6.6 million appropriated to the Fund was then held in trust by the United States for the White Earth Band. Clark Pet. App. A57, A115.

From 1991 through 1993, while the casino was being built and afterward, Northern Drywall made payments totaling more than $428,000 to Wadena. In response to an inquiry by the Internal Revenue Service, Clark and Wadena claimed that Wadena had an ownership interest in Northern Drywall and that the payments represented Wadena's share of the company's profits. But Wadena had never mentioned that alleged ownership interest in financial statements or loan applications that he filed before the IRS inquiry. Northern Drywall's own accountant was unaware that Wadena had any interest in the company. After the payments were discovered, Clark falsified and backdated corporate minutes and stock certificates in an attempt to document Wadena's interest. Clark Pet. App. A58.

In 1992, Northern Drywall made a $15,000 payment to Rawley as well. Clark and Rawley told the IRS that the payment was for consulting services, and Clark falsified Northern Drywall's corporate minutes to support that claim. In fact, Northern Drywall made the payment to secure Rawley's silence about its more substantial payments to Wadena, who was Rawley's political rival within the White Earth Band. Clark Pet. App. A58; Gov't C.A. Br. 6.

The Commissions Conspiracy. In their capacities as members of the RTC, petitioners created two commissions—the Gaming Control Commission and the Fishing Commission—of which petitioners were the sole members. The commissions served essentially no function. Petitioners did not assume any new duties as a result of their membership on the commissions. Clark Pet. App. A59.

Both commissions were little more than shells to provide cover for petitioners' payments to themselves of tens of thousands of dollars from the White Earth Band treasury. Those payments were in addition to petitioners' generous salaries for their membership on the RTC. During the period 1990 through 1993, petitioners extracted more than $1.2 million from the White Earth Band treasury on account

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of their membership on the RTC and the commissions. Clark Pet. App. A59-A60 & n.6.

The Election Conspiracy. In 1994, Clark and Rawley sought re-election to the RTC. Absentee ballots were key to victory in the election, because most White Earth Band members lived outside the Reservation, yet were eligible to vote for tribal officers. According to the procedure prescribed by the Minnesota Chippewa Tribe, absentee voters had to sign an affidavit before a notary swearing to several facts, including their own identity. The absentee ballot had to be mailed directly to the election headquarters. Clark Pet. App. A61.

During the 1994 election, Clark and Rawley participated in falsely notarizing a large number of absentee ballots, and Clark himself forged many of the ballots. Some of those recorded as casting absentee ballots in the 1994 election were already dead at that time. Clark and Rawley used the United States mails and notaries licensed by the State of Minnesota to perpetrate the fraud. Clark Pet. App. A61; Gov't C.A. Br. 7-8.

2. In August 1995, a grand jury returned a 44-count indictment charging petitioners with conspiracy, money laundering, mail fraud, willful misapplication of tribal funds, theft or bribery concerning programs receiving federal funds, and conspiracy to commit election fraud. Clark Pet. App. A55; Gov't C.A. Br. 1.[2]

Petitioners moved to dismiss the indictment for lack of jurisdiction. They argued that federal criminal laws of general applicability, such as the ones under which they were

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[2] The indictment also charged two notaries, Peter Pequette, Jr., and Henry Harper, and the White Earth Band's chief election judge, Carley Jasken, in connection with the election conspiracy. Pequette agreed to cooperate and pleaded guilty in state court to the unauthorized use of his notary stamp. Harper pleaded guilty to making a false writing, in violation of 18 U.S.C. 1001 (1994). Jasken was acquitted on all counts. Clark Pet. App. A61-A62 n.8; Gov't C.A. Br. 1 n.2

charged, cannot be used to prosecute a crime committed by one Indian against another Indian in Indian country. The district court denied the motion. Clark Pet. App. A13-A23.

The case went to trial in May 1996. During the six-week trial, the jury heard testimony from approximately 150 witnesses and received nearly 900 exhibits. Gov't C.A. Br. 2.

At the end of the trial, the district court instructed the jury on the elements of each offense charged. After enumerating the elements of 18 U.S.C. 1163, which makes it unlawful to "willfully misappl[y]" the funds of an "Indian tribal organization," the court instructed the jury that "[t]he White Earth Band of the Minnesota Chippewa Tribe is an Indian tribal organization" for purposes of 18 U.S.C. 1163. And, in instructing the jury with regard to 18 U.S.C. 666(a)(1)(B), which makes it unlawful for an agent of an "Indian tribal government" to "corruptly * * * accept[] * * * anything of value * * * intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such * * * government," the court substituted "White Earth Band" for "Indian tribal government." Clark and Wadena objected to those instructions on the ground that it was for the jury to decide whether the White Earth Band is an "Indian tribal organization" or an "Indian tribal government." The court overruled the objections. Clark Pet. App. A96-A97; Wadena Pet. 7; Wadena Pet. App. A107-A109, A111.

The jury found petitioners guilty on virtually all of the counts charged. Clark and Rawley were each acquitted on one count of misapplying tribal funds. Clark Pet. App. A60, A62.

3. The court of appeals affirmed. Clark Pet. App. A54-A107.

First, the court of appeals rejected petitioners' contention that the federal criminal laws under which they were charged—all of which apply generally throughout the United States—do not apply in Indian country if the perpetrator

and the victim are Indians. Clark Pet. App. A62-A69. Petitioners based their argument on two statutes dating from the 19th Century: the Indian Country Crimes Act, 18 U.S.C. 1152, and the Indian Major Crimes Act, 18 U.S.C. 1153. Section 1152 provides that "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States * * * shall extend to the Indian country"; the statute further states, however, that "[t]his section shall not extend to offenses committed by one Indian against the person or property of another Indian." Section 1153, in turn, provides that "[a]ny Indian who commits against the person or property of anther Indian or other person any of the following offenses"—which include murder, burglary, and rape, among others—"within the Indian country, shall be subject to the same law and penalties as all other persons committing any of [those] offenses, within the exclusive jurisdiction of the United States."

The court of appeals recognized that Section 1152 and Section 1153 are concerned only with a particular category of crimes: those crimes that the United States has jurisdiction to prosecute solely because they occur in Indian country, or in "any place within the sole and exclusive jurisdiction of the United States," as opposed to a place in which a State would have jurisdiction to prosecute. Clark Pet. App. A66-A68. The court explained that "[f]ederal statutes of general applicability, those in which situs of the offense is not an element of the crime, are not encompassed within [Section 1152]." *Id.* at A66. Accordingly, said the court, "the Indian-against-Indian exception contained in [Section 1152] does not apply to federal criminal laws of general applicability." *Id.* at A66-A67.

Second, the court of appeals rejected petitioners' argument that 18 U.S.C. 241, which broadly prohibits conspiracies to deprive a person of "any right or privilege secured to him by the Constitution or laws of the United States,"

cannot apply to a conspiracy to stuff the ballot box in a tribal election. Clark Pet. App. A70-A79. The court held that the election conspiracy in this case deprived tribal members of a right under a law of the United States—specifically, the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(8), which secures to a tribal member "the equal protection of [the] laws" of his tribe. Clark Pet. App. A74-A75.

The court of appeals observed that "this circuit, as well as several others," has held that the Equal Protection Clause of the Fourteenth Amendment protects against fraud in state and local elections. Clark Pet. App. A73 (citing cases). The court then concluded that "this protection against voter fraud has been carried over into the [Indian Civil Rights Act], as it applies to the facts of this case." *Id.* at A75. The court noted that among those facts was the Minnesota Chippewa Tribe's own adoption of the "one-man-one-vote principle" in tribal elections, as reflected in the provision of the tribal Constitution stating that "[a]ll members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe." *Id.* at A74-A75.

The court of appeals concluded that *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), which held that no implied private right of action exists under the Indian Civil Rights Act in federal court, does not preclude the prosecution under Section 241 of conspiracies to interfere with the exercise of rights secured by that Act. The court explained that "[n]othing in *Santa Clara* addresses the U.S. government's right or obligation to assume *criminal* jurisdiction when one of its laws of general[] applicability is violated." Clark Pet. App. A76. The court observed that a Section 241 prosecution against tribal officials in their individual capacities for conspiracy to violate rights secured by the Indian Civil Rights Act does not present the sort of threat to tribal sovereignty that *Santa Clara Pueblo* perceived to be presented

by a private civil action against tribal officials in their official capacities to challenge tribal policies and practices. The court explained that "[t]he Band's right to self-determination * * * is not being threatened by ensuring that voters are not defrauded"; to the contrary, "the Band's right to free and open elections is vindicated by the present criminal action." *Ibid.* The court also noted that the assumption in *Santa Clara Pueblo* that tribal courts would be available to vindicate rights secured by the Indian Civil Rights Act was inapplicable in cases such as this one: "[W]hen the entire tribal system allegedly is controlled by a few corrupt individuals," said the court, "there is no effective tribal forum available to protect an individual tribal member's civil rights." *Id.* at A77.

Finally, the court of appeals rejected petitioners' challenges to the jury instructions on the counts charging misapplication of funds of an "Indian tribal organization," in violation of 18 U.S.C. 1163, and offering of a bribe to, or acceptance of a bribe by, an agent of an "Indian tribal government," in violation of 18 U.S.C. 666. Clark Pet. App. A96-A97. The court declined to decide whether the district court erred in informing the jury that the White Earth Band is an "Indian tribal organization" for purposes of Section 1163, and in substituting "the White Earth Band" for an "Indian tribal government" in its instruction on Section 666. The court held that any claimed error was harmless because petitioners themselves had affirmatively argued "that the federal courts lack jurisdiction over this entire case because of the Band's status as an independent sovereign and their statuses as members of the Band." Clark Pet. App. A97.

Judge Beam dissented from the portion of the panel's opinion upholding petitioners' prosecution for election fraud under 18 U.S.C. 241. Clark Pet. App. A102-A106. He argued that an Indian tribe's "exclusive right to prosecute tribal election offenses" is "necessary to maintain political integrity." *Id.* at A105. He acknowledged that "Congress

could remove this aspect of sovereignty and interject federal election policies and remedies into tribal elections." *Ibid.* However, in the absence of any "express congressional authority" to prosecute tribal election fraud, he concluded that the federal government could not do so under Section 241. *Id.* at A105-A106.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other circuit. This Court's review is therefore not warranted.

1. a. Petitioners challenge the court of appeals' holding that federal criminal laws of general applicability—including all of the laws under which petitioners were prosecuted in this case—ordinarily apply in Indian country even when the perpetrator and the victim are Indians. See Wadena Pet. 16-30; Clark Pet. 24-25. Petitioner Wadena contends that the court of appeals' decision conflicts in that regard with decisions of this Court that, in his view, "find[] that federal jurisdiction does not arise in intra-Indian disputes except by explicit provision of Congress." Wadena Pet. 20.

The modern decisions of this Court on which petitioner Wadena relies (see Wadena Pet. 20-21) do not involve any question of federal criminal jurisdiction in Indian country.[3] Nor do they contain even isolated dicta stating that Congress, when enacting a statute applicable generally throughout the United States, must expressly provide that the statute is to apply to Indians in Indian country. The Court has elsewhere recognized a contrary rule: that "gen-

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[3] See *Duro* v. *Reina*, 495 U.S. 676 (1990) (holding that tribes cannot exercise criminal jurisdiction over Indians who are not tribal members); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978) (holding that the Indian Civil Rights Act does not impliedly authorize private civil actions in federal court against tribes or their officials); *Williams* v. *Lee*, 358 U.S. 217 (1959) (holding that state courts lack jurisdiction over civil cases by non-Indians against Indians arising out of events in Indian country).

eral Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960).

Petitioner Wadena also relies (Wadena Pet. 18, 21) on an older decision, *United States* v. *Quiver*, 241 U.S. 602 (1916), that does inyolve a federal prosecution of an Indian in Indian country. The Court was concerned in *Quiver* with whether the federal adultery statute could be used to prosecute adultery by an Indian couple on a reservation. The Court perceived the issue to be governed by two statutes: the Indian Country Crimes Act, now codified at 18 U.S.C. 1152, and the Indian Major Crimes Act, now codified at 18 U.S.C. 1153. The Indian Country Crimes Act, while extending to Indian country "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States," excludes "offenses committed by one Indian against the person or property of another Indian." 18 U.S.C. 1152. The Indian Major Crimes Act, however, provides for exclusive federal jurisdiction over certain offenses committed by an Indian against another Indian in Indian country. 18 U.S.C. 1153. The Court concluded that the federal government had no authority to bring the prosecution in *Quiver* because adultery was not among the offenses enumerated in the Indian Major Crimes Act, reasoning that "the enumeration in [that Act] of certain offenses as applicable to Indians in the reservations carries with it some implication of a purpose to exclude others." 241 U.S. at 606.

Quiver was decided at a time before tribal Indians had been made citizens of the United States. See Act of June 2, 1924, ch. 233, 43 Stat. 253 (declaring all U.S.-born Indians to be citizens). The common understanding at that time was that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Tuscarora Indian Nation*, 362 U.S. at 116

(quoting *Elk* v. *Wilkins*, 112 U.S. 94, 100 (1884)). It was in the context of that time that the Court assumed in *Quiver* that Congress intended Indians to be subject to prosecution only under those laws that had expressly been made applicable to them, such as those enumerated in the Indian Major Crimes Act. But "[h]owever that may have been, it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians." *Ibid.*

This Court has recognized since *Quiver* that federal criminal jurisdiction over Indians in Indian country is not confined to the offenses specified in the Indian Major Crimes Act (or to other offenses expressly made applicable to Indians). In *United States* v. *Wheeler*, 435 U.S. 313 (1978), the Court explained that federal jurisdiction over crimes committed by Indians extends not only to the crimes enumerated in the Indian Major Crimes Act, but also "to crimes over which there is federal jurisdiction regardless of whether an Indian is involved." *Id.* at 330 n.30. The Court offered as an example the generally applicable offense of assault on a federal officer. *Ibid.*; see also R.N. Clinton et al., *American Indian Law* 294 (3d ed. 1991) ("If the crime is a federal crime of nationwide application, federal jurisdiction exists irrespective of the locus of the crime or the status of the parties unless the prosecution for the crime would interfere with Indian treaty or other rights.") (emphasis omitted).[4]

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[4] Congress has also recognized that federal jurisdiction over Indian-against-Indian offenses in Indian country is not limited to the offenses enumerated in the Indian Major Crimes Act. A phrase omitted from petitioner Wadena's quotation (Wadena Pet. 22) from the House Report on the Indian Crimes Act of 1976 makes that point clear. After stating that jurisdiction over Indian-against-Indian offenses other than those listed in the Indian Major Crimes Act "rests with the tribe," the House Report expressly acknowledges the exception to that rule "for crimes that are peculiarly Federal." H.R. Rep. No. 1038, 94th Cong., 2d Sess. 3 (1976).

b. Petitioners assert that a conflict exists between the Second, Fourth, and Seventh Circuits, on the one hand, and the Sixth, Eighth, Ninth, and Tenth Circuits, on the other, over the applicability of general federal criminal laws to Indian-against-Indian offenses in Indian country. See Wadena Pet. 23-30; Clark Pet. 24-25. Petitioners are incorrect. The courts of appeals are in substantial agreement on that issue.

The only Fourth Circuit decision on which petitioners rely, *United States* v. *Welch*, 822 F.2d 460 (1987), is wholly inapposite. To be sure, the court stated in that case that "[w]hen there is a crime by an Indian against another Indian within Indian country only those offenses enumerated in the Major Crimes Act may be tried in the federal courts." *Id.* at 464. But the court had no occasion in *Welch* to consider the applicability in Indian country of general federal criminal laws. The only crimes charged in that case were rape and a state-law sexual offense. The court reversed the rape conviction because the defendant was not tried under the federal statute that defined the offense of rape within the exclusive jurisdiction of the United States. *Id.* at 464-465. The court reversed the sexual-offense conviction because the defendant's conduct, although a violation of state law, was not one of the crimes enumerated in the Indian Major Crimes Act. *Ibid.*

All of the courts of appeals to address the issue squarely agree that general federal criminal laws ordinarily do apply to Indian-against-Indian offenses in Indian country. In the most recent of the assertedly conflicting decisions cited by petitioners, for example, the Seventh Circuit recognized that "[a]s a general rule, statutes written in terms applying to all persons include members of Indian tribes as well." *United States* v. *Funmaker*, 10 F.3d 1327, 1330 (1993). The court suggested that an exception should be made to that rule only "when the application of a statute would affect Indian or tribal rights recognized by treaty or statute, or would affect

rights essential to self-governance of intramural matters." *Ibid.* It is only then, said the court, that a statute "specifically must evince Congressional intent to interfere with those rights." *Id.* at 1330-1331. The court went on to conclude that 18 U.S.C. 844(i) (1994), which prohibits damaging or destroying property used in or affecting interstate commerce, and 18 U.S.C. 924(c) (1994), which prohibits the use of a destructive device in connection with a crime of violence, do not affect rights essential to tribal self-governance and, consequently, do not require an express statement of congressional intent that they apply to Indians in Indian country. The court reached that conclusion even though those laws were being used in *Funmaker* to prosecute an Indian who destroyed a reservation bingo hall at the express direction of tribal officials. The court explained that "[t]he decision-making power of Indian tribes ends * * * at the point when those decisions would violate federal law designed to safeguard important federal interests such as the free flow of interstate commerce." 10 F.3d at 1332.

In the only assertedly conflicting case cited by petitioners from the Second Circuit, *United States* v. *Markiewicz*, 978 F.2d 786 (1992), cert. denied, 506 U.S. 1086 (1993), the court found it unnecessary to decide whether "all federal criminal laws appl[y] to Indians who commit crimes against other Indians on Indian territory." *Id.* at 800. The court concluded that federal jurisdiction over all of the crimes charged in that case could be sustained on narrower grounds. *Ibid.*[5] It is thus erroneous for petitioners to assert that the Second Circuit has adopted any definitive position on the question.

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[5] The court concluded, for example, that federal jurisdiction exists over violations of 18 U.S.C. 1163, which prohibits the theft of funds of a tribal organization, because the text and legislative history of the statute indicate that "[C]ongress sought to create federal-court jurisdiction over this particular kind of Indian-against-Indian crime." 978 F.2d at 800. Section 1163 is one of the statutes under which petitioners were prosecuted in this case.

The court indicated in dicta, moreover, that federal jurisdiction should extend at least to prosecutions under all federal criminal laws that "protect an independent federal interest." *Ibid.* Such a standard could be expected to permit the application of most general federal criminal laws to Indians in Indian country in most circumstances. As the court of appeals observed in this case, "[i]f Congress passes any federal act, assuming it has constitutional authority to do so, there always exists a federal concern and interest." Clark Pet. App. A67.

In sum, whatever differences may arguably exist in the standards articulated by the circuits, those standards have not led, and are unlikely to lead, to different results on similar facts. Indeed, the Second and Seventh Circuits held that federal criminal jurisdiction was proper in all of the assertedly conflicting cases on which petitioners rely. See *Funmaker*, 10 F.3d at 1331-1332; *Markiewicz*, 978 F.2d at 800-802; *United States* v. *Smith*, 562 F.2d 453, 458 (7th Cir. 1977), cert. denied, 434 U.S. 1072 (1978).[6]

2. Petitioners Clark and Rawley challenge their convictions under 18 U.S.C. 241, claiming that the statute does not apply to a conspiracy to stuff the ballot box in a tribal election. See Clark Pet. 6-23; Rawley Pet. 7-12. Petitioners' claim lacks merit. Nor does that claim present any issue of general significance, given the infrequency with which the United States prosecutes election fraud or any other conduct of tribal officials under Section 241. The claim is of little practical consequence even in this case, given petitioners' concurrent sentences on multiple other counts.[7]

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[6] Petitioner Wadena also claims (Wadena Pet. 27-28) that there is conflict within the Eighth and Ninth Circuits on this issue. That claim, even if it were accurate, does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[7] Petitioners were sentenced to concurrent terms of imprisonment on each of the counts on which they were convicted—21 of which in the case of petitioner Clark and 16 of which in the case of petitioner Rawley were

a. As relevant here, Section 241 makes it unlawful for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. 241 (Supp. II. 1996). In this case, petitioners were charged with conspiracy to injure and oppress the rights of White Earth Band members under the equal protection clause of the Indian Civil Rights Act of 1968, 25 U.S.C. 1302(8), "to have their votes in the [tribal] election cast and tabulated fairly and free from dilution by ballots illegally and improperly cast and tabulated." Clark Pet. App. A139 (Indictment ¶ 106(b)).

That charge falls within the textual scope of Section 241. The Indian Civil Rights Act is a "law[] of the United States" that confers "right[s]" and "privilege[s]" on persons in the United States. The Act secures to Indians various rights as against their tribal governments that are analogous, in many respects, to the rights that the United States Constitution secures to citizens as against their federal and state governments. The Act thus prohibits a tribe from, among other things, "deny[ing] to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. 1302(8). The White Earth Band's own organic law—the Constitution of the Minnesota Chippewa Tribe—also guarantees tribal members' equal protection rights. Minnesota Chippewa Tribe Const. Art. XIII ("All members of the Minnesota Chippewa Tribe shall be accorded by the governing body equal rights, equal protection, and equal opportunities to participate in the economic resources and activities of the Tribe.") (Clark Pet. App. A74). A conspiracy to deprive a tribal member of his right under the Indian Civil Rights Act to the equal protection of his tribe's laws is thus, within the terms of Section

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not based on Section 241. See Clark Pet. 2; Clark Pet. App. A43-A51; Rawley Judgment 1-3.

241, a conspiracy "to injure [or] oppress * * * [a] person * * * in the free exercise or enjoyment of [a] right or privilege secured to him by the * * * laws of the United States."[8]

The question remains whether a tribal member's right to equal protection of his tribe's laws includes the right not to have his vote in a tribal election diluted by fraud. This Court has recognized that vote-dilution schemes, including stuffing the ballot box, violate citizens' constitutional right to vote in federal elections. See *Reynolds* v. *Sims*, 377 U.S. 533, 554-556 (1964) (citing cases).[9] The Court has not decided

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[8] Petitioner Clark argues (Clark Pet. 14) that "[s]imply because a right exists under federal law does not mean that it may serve as the basis for a prosecution under [Section 241]." This Court has recognized, however, that Section 241's reference to "any right or privilege secured * * * by the Constitution or laws of the United States" must be construed broadly. See, *e.g.*, *United States* v. *Price*, 383 U.S. 787, 800 (1966) ("The language of § 241 is plain and unlimited. * * * [I]ts language embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States."); *United States* v. *Guest*, 383 U.S. 745, 753 (1966) ("when § 241 speaks of 'any right or privilege secured . . . by the Constitution or laws of the United States,' it means precisely that"). The Court has suggested that Section 241 is inapplicable only to rights enforceable by a separate exclusive statutory scheme. See *United States* v. *Johnson*, 390 U.S. 563, 567 (1968). *Price* and *Guest* also refute petitioner Clark's more specific claim (Clark Pet. 14) that "§ 241 does not extend to conspiracies to violate rights secured by * * * the Fourteenth Amendment." See *Price*, 383 U.S. at 801 (Due Process Clause of the Fourteenth Amendment); *Guest*, 383 U.S. at 753-754 (Equal Protection Clause).

[9] The cases cited by the Court in *Reynolds* upheld prosecutions under Section 19 of the Criminal Code, the predecessor to Section 241, involving vote fraud conspiracies in federal elections. See *United States* v. *Saylor*, 322 U.S. 385 (1944) (scheme to stuff ballot box with forged ballots); *United States* v. *Classic*, 313 U.S. 299 (1941) (scheme to alter ballots and to certify falsely number of votes); *United States* v. *Mosley*, 238 U.S. 383 (1915) (scheme not to count legitimate votes cast). Petitioners note (Clark Pet. 13) that *United States* v. *Bathgate*, 246 U.S. 220 (1918), held that a conspiracy to bribe voters was not covered by Section 19. But *Bathgate* rested on the fact that Congress had repealed a section of the law, of which Section 19 was a part, that specifically prohibited bribing voters.

whether similar vote-dilution schemes involving state or local elections violate citizens' rights under the Equal Protection Clause of the Fourteenth Amendment. See *Anderson* v. *United States*, 417 U.S. 211, 228 (1974) (declining to reach the question). Two circuits have held, however, that vote-dilution schemes involving only a state or local election do violate voters' rights under the Equal Protection Clause, and thus may be prosecuted under Section 241. See *United States* v. *Olinger*, 759 F.2d 1293, 1302-1304 (7th Cir.), cert. denied, 474 U.S. 839 (1985); *United States* v. *Stollings*, 501 F.2d 954, 955 (4th Cir. 1974); *United States* v. *Anderson*, 481 F.2d 685, 698-700 (4th Cir. 1973), aff'd on other grounds, 417 U.S. 211 (1974). No circuit has reached a contrary conclusion.

The Seventh Circuit explained in *Olinger* that, "[w]hile it may be that the Constitution provides the right to vote only in federal elections and that the right to vote in purely state elections must derive from state constitutions or laws, * * * where states provide for the election of officers, that right * * * is protected against dilution involving 'state action' under the Equal Protection Clause of the Fourteenth Amendment." 759 F.2d at 1303; accord *Anderson*, 481 F.2d at 699. A similar rationale applies to vote dilution in tribal elections. The United States Constitution does not, to be sure, provide a right to vote in tribal elections. And a tribe may permissibly select its leaders through means other than election. Or the tribe may choose to conduct its elections on a basis other than "one person, one vote." See 25 U.S.C. 3601(4) (congressional finding that "Indian tribes possess the inherent authority to establish their own form of government"). Where, however, a tribe has chosen to elect its

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Id. at 225-226. In *Saylor*, a case that, like this one, involved the forging of ballots, the Court distinguished *Bathgate* and held that, consistent with its earlier decision in *Mosley*, a conspiracy to stuff a ballot box with false ballots could be prosecuted under Section 19. *Saylor*, 322 U.S. at 388-390.

leaders on a "one person, one vote" basis, as the White Earth Band indisputably has (see Clark Pet. App. A74-A75), a tribal member is protected against vote-dilution schemes by the equal protection clause of the Indian Civil Rights Act. See *White Eagle* v. *One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973) (per curiam) (where "[t]he tribe itself * * * has established voting procedures precisely paralleling those commonly found in [Anglo-American] culture," the equal protection clause of the Indian Civil Rights Act requires "a fair compliance with the tribe's own voting procedures in accordance with the principles of" one person, one vote); accord *Howlett* v. *Salish & Kootenai Tribes*, 529 F.2d 233, 237-239 (9th Cir. 1976); cf. *United States* v. *Doherty*, 126 F.3d 769, 780 (6th Cir. 1997) (courts in applying the Indian Civil Rights Act must consider whether a particular tribe's concepts of equal protection and due process accord with "the Anglo-American system") (internal quotation marks omitted), cert. denied, 118 S. Ct. 2299 (1998). The perpetrators of such vote-dilution schemes may be prosecuted by the United States under Section 241.[10]

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[10] As noted in the text, the Fourth and Seventh Circuits have required that, in order to violate rights secured by the Equal Protection Clause, a scheme to stuff the ballot box in a state or local election must involve some action "under color" of state law. But that requirement is not particularly rigorous:

> It is * * * not necessary that the "involvement of the State need be either exclusive or direct"; it may be merely "peripheral." Nor is it essential that the state official be a party defendant; it is sufficient if the proof involves "a charge of active connivance by agents of the State" in the wrongful acts done in furtherance of the conspiracy.

Olinger, 759 F.2d at 1303-1304 (quoting *Guest*, 383 U.S. at 755).

The election conspiracy in this case was clearly carried out "under color" of tribal law. Not only were petitioners Clark and Rawley officials of the White Earth Band. But the indictment alleged that they used their official positions to "cause[] to be paid, from the White Earth Band of Chippewa Indians General Fund, money, disguised as assistance payments, to various individuals to obtain [absentee ballot] request cards and

Petitioner Rawley complains (Rawley Pet. 8, 11-12) that he did not have fair warning that Section 241 applied to his conduct. This Court has, however, "upheld convictions under § 241 * * * despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *United States* v. *Lanier*, 520 U.S. 259, 269 (1997). Those prior decisions need not be ones of this Court. *Id.* at 268-269; see also *Screws* v. *United States*, 325 U.S. 91, 104 (1945) (plurality opinion). The decisions of this Court gave petitioners the requisite "reasonable warning" that schemes to stuff the ballot box in a federal election generally violate constitutional rights. The decisions of two courts of appeals gave petitioners reasonable warning that schemes to stuff the ballot box in a state or local election specifically violate the Equal Protection Clause of the Fourteenth Amendment. The decisions of the Eighth Circuit gave petitioners reasonable warning that, in a tribe that "has established voting procedures precisely paralleling those commonly found in [Anglo-American] culture," *White Eagle*, 478 F.2d at 1314, conduct that would violate the Equal Protection Clause of the Fourteenth Amendment in a state or local election violates the equal protection clause of the Indian Civil Rights Act in a tribal election. See *Means* v. *Wilson*, 522 F.2d 833, 841 (8th Cir. 1975) (recognizing that a conspiracy involving tribal officials to ensure the reelection of the tribal council president may violate the equal protection

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absentee ballots" in order to carry out the election conspiracy. Clark Pet. App. A141 (Indictment ¶¶ 116, 117). The indictment further alleged that petitioners conspired with a tribal election judge, among others, in order to commit the election fraud. *Id.* at A140-A142 (Indictment ¶¶ 110, 113, 114, 118, 124). Petitioners also were alleged to have conspired with notaries licensed by the State of Minnesota, two of whom were indicted in this case, who illegally notarized the fraudulently cast ballots. *Id.* at A16; A141-A142 (Indictment ¶¶ 120-123).

clause of the Indian Civil Rights Act), cert. denied, 424 U.S. 958 (1976).[11] And the Constitution of the Minnesota Chippewa Tribe and the election laws and procedures of the White Earth Band, which reflect concepts of equal protection "precisely paralleling those commonly found in [Anglo-American] culture," *White Eagle*, 478 F.2d at 1314, gave petitioners reasonable warning that equal protection constraints on vote-dilution schemes would apply to the tribal election here.

b. Petitioners essentially request an exception to Section 241's "plain and unlimited" language, *United States* v. *Price*, 383 U.S. 787, 800 (1966), on the ground that prosecution of tribal election fraud invades tribal sovereignty in a manner contrary to the spirit of the Indian Civil Rights Act. Clark Pet. 15-23; Rawley Pet. 8-9. No support for petitioners' position can be found in the text of Section 241. The text of the Indian Civil Rights Act likewise does not reflect any congressional intent to exclude conspiracies to deprive individuals of the rights secured by that Act from the reach of Section 241.

Nor does the legislative history of the Indian Civil Rights Act demonstrate, as petitioner Clark contends (Clark Pet. 17-18), that Congress intended to deprive the United States of the authority to prosecute violations of the Act. It is true that S. 963, 98th Cong., 1st Sess. (1965), one of several bills considered by the Senate Judiciary Committee during the hearings that ultimately produced the Indian Civil Rights Act, would have authorized the Attorney General "to receive and investigate" complaints filed by or on behalf of an Indian alleging a violation of any civil right and to "bring such

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[11] The Eighth Circuit's decisions in *White Eagle* and *Means*, to the extent that they hold or assume that a private right of action exists under the Indian Civil Rights Act, were overruled by *Santa Clara Pueblo*, 436 U.S. at 59-72. But the Eighth Circuit's analysis in those cases of the substantive scope of the equal protection clause of the Indian Civil Rights Act was not undermined by *Santa Clara Pueblo*.

criminal or other action as he deems appropriate to vindicate and secure such right to such Indian." *Constitutional Rights of the American Indian: Hearings on S. 961, etc., Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 7 (1965) (*Senate Hearings*); see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 67-68 (1978) (discussing S. 963). The Judiciary Committee offered no explanation why S. 963 was not incorporated into the version of the Act that was reported to the full Senate. The statements of the witnesses at the Judiciary Committee hearings do not establish the reason. As Justice White noted in his dissenting opinion in *Santa Clara Pueblo*, "[w]hile two witnesses did express their fears that the proposal would disrupt tribal governments, many others expressed the view that the proposals gave the Attorney General no more authority than he already possessed." 436 U.S. at 78. The Solicitor of the Department of the Interior, the principal witness for the United States at the hearings, was among those taking that position. *Ibid.*; see *Senate Hearings* at 20, 319 (statements of both the Solicitor and the Acting Secretary of the Department of the Interior describing the bill as "unnecessary").[12] The omission of S. 963 from the Indian Civil Rights Act thus cannot properly be viewed as an expression of Congress's intent to bar prosecutions under Section 241 for violations of rights secured by that Act.

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[12] It may well be that S. 963 was considered unnecessary by the government representatives, and unobjectionable by most tribal representatives, because they did not perceive S. 963 as directed at the enforcement of Indians' newly secured rights against tribal officials. They instead perceived S. 963 as directed primarily at the enforcement of Indians' existing constitutional and civil rights against federal, state, and local officials and private businesses. See *Santa Clara Pueblo*, 436 U.S. at 77 (noting that "the focus of S. 963 was in large part aimed at nontribal deprivations of Indian rights"); see also *Senate Hearings* at 67, 71, 75, 80, 86, 132, 143-144, 153, 194, 206 (endorsements of S. 963 by representatives of the Association on American Indian Affairs, the National Congress of American Indians, and numerous Indian tribes).

None of the decisions on which petitioners rely in this regard (see Clark Pet. 18-22; Rawley Pet.9-10) holds, or even suggests, that Section 241 does not reach conspiracies to violate rights secured by the Indian Civil Rights Act, including the right not to have one's vote in a tribal election diluted by fraud. Those cases are principally concerned with whether any private right of action exists, under the Indian Civil Rights Act or under any other federal statute, that would enable an individual to bring a civil action in federal district court to enforce rights secured by the Act. See *Santa Clara Pueblo*, 436 U.S. at 58-72; *Nero* v. *Cherokee Nation*, 892 F.2d 1457, 1461-1463 (10th Cir. 1989); *Wheeler* v. *Swimmer*, 835 F.2d 259, 261-262 (10th Cir. 1987); *Runs After* v. *United States*, 766 F.2d 347, 353-354 (8th Cir. 1985); *Groundhog* v. *Keeler*, 442 F.2d 674, 681-683 (10th Cir. 1971). The question presented in this case is, of course, unlike the question presented in *Santa Clara Pueblo*. The question there was whether to read into the Indian Civil Rights Act a private right of action to enforce its provisions that Congress did not expressly place there. The question here is not whether similarly to read into the Indian Civil Rights Act an implied right on the part of the United States to prosecute violations of its provisions. It is instead whether to read into that Act an *exception*, which Congress did not expressly place there, to the authority that the United States would otherwise possess under Section 241 to prosecute conspiracies to violate "any right or privilege secured * * * by the * * * laws of the United States."[13]

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[13] Petitioner Rawley argues (Rawley Pet. 10-11) that the *Santa Clara Pueblo* and *Runs After* decisions indicate that federal courts do not have jurisdiction to interpret the rights secured by the Indian Civil Rights Act. He is wrong. Those cases, which involved disputes arising in the civil context, foreclose only a particular remedy, a private right of action. By making a writ of habeas corpus available to "any person * * * to test the legality of his detention by order of an Indian tribe," 25 U.S.C. 1303,

The premise of petitioners' argument—that tribal sovereignty is invaded by a Section 241 prosecution such as this one—is also incorrect. As the court of appeals recognized, there is a significant difference between, on the one hand, the federal government's interfering with official actions of a tribal government and internecine disputes over them, see, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 51 (challenge to "the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members"), and, on the other, the federal government's prosecuting the naked corruption by individual tribal officials of a tribe's own chosen election procedures. As the court of appeals recognized, "[t]he [White Earth] Band's right to self-determination * * * is not being threatened by ensuring that voters are not defrauded"; rather, "the Band's right to free and open elections is vindicated by the present criminal action." Clark Pet. App. A76.

c. Finally, as petitioner Clark acknowledges, this is the only case in which the United States has prosecuted tribal election fraud under Section 241. See Clark Pet. 15 (noting "the absence of any similar § 241 prosecution for violations of the [Indian Civil Rights Act] in the 30 years since its enactment"). No other such prosecution is contemplated at this time. The United States has no interest in generally policing, through Section 241 or otherwise, the elections and other internal activities of Indian tribes.[14] To the contrary,

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Congress plainly contemplated a role for the federal courts in interpreting the Indian Civil Rights Act.

[14] Nor does Section 241 provide a means for the United States to do so. As noted in the text, in order to establish a violation of Section 241, the United States must prove that the defendants conspired to violate a "right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *Lanier*, 520 U.S. at 267 (quoting *Screws*, 325 U.S. at 104). And the United States must do so beyond a reasonable doubt. It is thus only in rare cases, such as this one, involving clear, substantial, and egregious violations of

the United States has repeatedly reaffirmed "the right of Indian tribes to self-government," including the right to "exercise inherent sovereign powers over their members and territory," and has dealt with Indian tribes "on a government-to-government basis" to address issues of mutual concern. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (1998); see also 25 U.S.C. 3601(3) and (4) (acknowledging the "inherent sovereignty of Indian tribes," including "the inherent authority to establish their own form of government"). The United States can be expected to continue to exercise its prosecutorial authority in accordance with those principles, which counsel against prosecuting tribal members in connection with their conduct of internal tribal affairs except where overriding federal interests are at stake.[15] There is thus no reason to conclude that petitioners' challenge to the use of Section 241 to prosecute tribal election fraud is one of general significance that merits this Court's review.[16]

3. Petitioner Wadena argues that the district court committed structural error in its jury instructions in two respects: *first*, by instructing the jury that the White Earth

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individuals' rights under the Indian Civil Rights Act that the United States could expect to prevail on a Section 241 prosecution against tribal officials.

[15] A United States Attorney is required to consult with the Public Integrity Section of the Department of Justice before instituting any prosecution under Section 241 for corruption in the electoral process. United States Dep't of Justice, *United States Attorneys' Manual* 9-85.210 (1997). Those procedures were followed in this case. The Department of Justice is considering the adoption of additional internal consultative procedures with respect to prosecutions of tribal officials.

[16] Petitioner Rawley also poses the question (Rawley Pet. i) "[w]hether [his] right under the Due Process Clause of the Fifth Amendment to a fair trial was violated by being tried on non-election offenses as well as election offenses." Rawley's petition contains no argument on this question, however, and he did not contest joinder of the election offenses with the non-election offenses in the court of appeals. Clark Pet. App. A79 n.22. He has accordingly waived the issue.

Band is an "Indian tribal organization" under 18 U.S.C. 1163, which makes it unlawful to "willfully misappl[y]" the funds of an "Indian tribal organization," and, *second*, by substituting the "White Earth Band of Chippewa Indians" for "Indian tribal government" in its jury instruction on 18 U.S.C. 666, which prohibits an agent of an "Indian tribal government" from "accept[ing] or agree[ing] to accept, anything of value * * * intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such * * * government." Wadena Pet. 4-8. Those instructions were not erroneous.[17]

In instructing the jury that the White Earth Band is an "Indian tribal organization" and an "Indian tribal government," within the meaning of Section 1163 and Section 666, the district court was properly resolving questions that turned entirely on legislative facts. Legislative facts are those that "have relevance to legal reasoning and the law-making process," as opposed to adjudicative facts that are "simply the facts of the particular case." Fed. R. Evid. 201 advisory committee's note. A legislative fact, "[u]nlike an adjudicative fact, * * * does not change from case to case but, instead, remains fixed." *United States* v. *Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir.) (quoting *United States* v. *Bowers*, 660 F.2d 527, 531 (5th Cir. Unit B Sept. 1981) (per curiam)), cert. denied, 515 U.S. 1127 (1995); see also *United States* v. *Gould*, 536 F.2d 216, 220 (8th Cir. 1976) ("Legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally,

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[17] The court of appeals did not address whether the instructions constituted error because it found the claimed error to be harmless. The court reasoned that the asserted error could not possibly have harmed petitioners because the central premise of their defense was "the Band's status as an independent sovereign and their statuses as members of the Band." Clark Pet. App. A97. Petitioner Wadena does not attempt to demonstrate that the challenged jury instructions were, in fact, prejudicial to him in any respect.

while adjudicative facts are those developed in a particular case.").

A number of circuits have recognized that a trial court may remove from the jury's consideration an element of an offense that involves only issues of uncontroverted legislative fact. See, *e.g.*, *Hernandez-Fundora*, 58 F.3d at 810-812 (whether a prison was within the "special maritime and territorial jurisdiction of the United States" for purposes of 18 U.S.C. 7); *Bowers*, 660 F.2d at 530-531 (whether a military facility was located on land that was the property of the United States for purposes of 18 U.S.C. 7); *Gould*, 536 F.2d at 220-221 (whether cocaine hydrochloride was a derivative of coca leaves and thus a schedule II controlled substance under 21 U.S.C. 812).[18]

The question whether the White Earth Band is an "Indian tribal organization" or an "Indian tribal government" likewise turns on legislative facts that "do[] not change from case to case but, instead, remain[] fixed." *Hernandez-Fundora*, 58 F.3d at 812 (quoting *Bowers*, 660 F.2d at 531). Petitioner Wadena does not identify a single fact unique to this case that bears on the question. Indeed, he concedes

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[18] Cf. *United States* v. *Wunder*, 919 F.2d 34, 36 (6th Cir. 1990) (court permissibly instructed the jury that, as a matter of law, blank IRS 1040 forms are not tax returns for purposes of a prosecution under 26 U.S.C. 7203 for failure to file a tax return); *United States* v. *Madeoy*, 912 F.2d 1486, 1494-1495 (D.C. Cir. 1990) (court permissibly instructed the jury that, as a matter of law, a VA fee appraiser is a "public official" for purposes of a prosecution under 18 U.S.C. 201(a)(1) for bribery of a public official), cert. denied, 498 U.S. 1105 (1991); *United States* v. *Nolan*, 784 F.2d 496, 498 (3d Cir.) (court permissibly instructed the jury that, as a matter of law, mail that was placed through a mail slot in the outer door of a two-family residence and remained on the floor in a common area was in an authorized mail depository for purposes of a prosecution under 18 U.S.C. 1708 for possession of items stolen from the mail), cert. denied, 476 U.S. 1144 (1986).

(Wadena Pet. 4) that the question is "uncontroversial."[19] Nor does he identify any decision holding that a district court erred in resolving itself, rather than submitting to the jury, the question whether an entity is an "Indian tribal organization," under 18 U.S.C. 1163, or an "Indian tribal government" under 18 U.S.C. 666.

None of the assertedly conflicting cases on which petitioner Wadena relies (see Wadena Pet. 8-13) involves a district court's taking from the jury a question that turned solely on legislative facts. They instead involve questions that turned on adjudicative facts that were peculiar to that case. See, *e.g.*, *United States* v. *Lopez*, 71 F.3d 954, 960-961 (1st Cir. 1995) (whether defendant's false statements to banks on loan applications were material under 18 U.S.C. 1014), cert. denied, 518 U.S. 1008 (1996); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (whether defendant's false entries on records of thrift institution were material under 18 U.S.C. 1006). Accordingly, whether or not the courts committed error in those cases, and whether or not any such error was structural, are questions without any particular relevance to this case.

The Court already has an opportunity this Term in *Neder* v. *United States*, cert. granted, No. 97-1985 (Oct. 13, 1998), to resolve the conflict identified by petitioner Wadena as to whether a district court's failure to instruct the jury on an element of an offense is subject to harmless-error analysis. Wadena has not requested that his petition be held for disposition in light of *Neder*. There is no need for the Court to

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[19] The United States has treated the White Earth Band as a distinct tribal political entity. See, *e.g.*, White Earth Reservation Land Settlement Act of 1985, Pub. L. No. 99-264, §§ 2, 11, 12, 17, 100 Stat. 61, 69, 70; 50 C.F.R. 32.42 (acknowledging Band's regulatory authority over hunting and fishing on its Reservation). The government offered extensive evidence at trial about the organization, governance, and laws of the Band. Petitioners offered no evidence that the Band is not a "tribal organization" or a "tribal government."

do so. As explained above, this case does not implicate the asserted conflict, because the district court resolved only questions of legislative fact, not questions of adjudicative fact as in *Neder* and the cases on which Wadena relies.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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